

No. PD-0553-20
In the
Texas Court of Criminal Appeals
At Austin

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COURT OF CRIMINAL APPEALS
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—◆—
No. 01-18-00897-CR
In the
Court of Appeals for the
First District of Texas
At Houston

—◆—
No. 1532340
In the 178th District Court
Of Harris County, Texas

—◆—
JAMAILE JOHNSON
Appellant
V.
THE STATE OF TEXAS
Appellee

—◆—
STATE'S BRIEF ON DISCRETIONARY REVIEW
—◆—

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ORAL ARGUMENT NOT PERMITTED

STATEMENT REGARDING ORAL ARGUMENT

This Court did not permit oral argument in this case.

IDENTIFICATION OF THE PARTIES

Pursuant to Tex. R. App. P. 68.4(a), a complete list of the names of all interested parties is provided below.

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Trial Judge:

Honorable Carolyn Marks Johnson

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

Appellant was charged by indictment with aggravated robbery. (CR – 14) He was convicted of theft and sentenced to 11 years in the Texas Department of Criminal Justice, Institutional Division. (CR – 87-88, 95-97) Appellant timely filed notice of appeal and the trial court certified his right of appeal. (CR – 100-103) On appeal, appellant argued that the evidence is legally insufficient to support his conviction, the trial court erred by sustaining hearsay objections to certain defense testimony, and he received ineffective assistance of counsel at trial.

On May 28, 2020, a panel of the First Court of Appeals issued a majority opinion that reversed the trial court’s judgment and remanded the case for a new trial. *Johnson v. State*, 606 S.W.3d 386 (Tex. App.—Houston [1st Dist.] May 28, 2020, pet. granted). On the same date, a concurring opinion and a dissenting opinion were also issued. *Id.* at 403-406 (Keyes, J., concurring); *id.* at 407-13 (Goodman, J., dissenting). No motion for rehearing was filed.

This Court granted review on whether the majority failed to apply the standard of review correctly in analyzing appellant’s ineffective-assistance claim.

ISSUE PRESENTED

Did the court of appeals fail to apply the standard of review correctly in its analysis of appellant's ineffective-assistance-of-counsel claim?

STATEMENT OF FACTS

On November 28, 2016, the complainant and her husband drove their truck to an auto shop. (RRII – 174, 199-200) The complainant's truck was a 2002 brown cab-and-a-half Chevrolet pickup truck with stripes on the tailgate. (RRII – 175, 203-204, 212) The truck had window tint, but the cab interior was still visible. (RRII – 187; RRIII – 49) The complainant's husband parked at the back of the shop's parking lot and left the truck running while he went inside, leaving the complainant in the passenger seat. (RRII – 177-79, 187-88, 200)

Soon thereafter, appellant rode up to the truck on a bicycle, opened the unlocked truck door, and got into the driver seat. (RRII – 178-79, 187-88; RRIII – 102-103) Appellant had a screwdriver, which he pulled out of his pocket when he was inside the truck. (RRII – 179; RRIII – 100, 104, 119) He began moving the truck back and forth as the complainant tried to get out. (RRII – 180-81) The complainant eventually jumped out and appellant drove away in the truck. (RRII – 181, 201) Police were called and located the truck in approximately 15 minutes. (RRII – 161-62, 210) A police chase then ensued for about 45 minutes before police stopped appellant in the truck. (RRII – 217)

At trial, appellant's step-father, Lewis Armstead, testified that he was with appellant at Armstead's mother's house before the offense occurred. (RRIII – 28-30) While they were there, appellant went outside and began rubbing grass on himself. (RRIII – 30-31) When Armstead called out to him, appellant "looked like he was not there" (RRIII – 31) Afterwards, appellant laid down on a railroad track and started throwing rocks. (RRIII – 31) The police were called but they did not take appellant to the hospital. (RRIII – 32) After the police left, appellant left the house for about 20 minutes and returned in a truck that was not his. (RRIII – 32-34) Armstead also testified that "[c]oming up," appellant had "schizophrenia or something" (RRIII – 32)

Appellant's brother, Kenyon Johnson, saw appellant during the police chase. (RRIII – 53) When he tried to block appellant and stop him at one point during the chase, appellant just looked at him and "kind of went around" before officers asked Johnson to back off. (RRIII – 53-54) Johnson saw appellant when he was arrested and testified that he looked "[k]ind of spacy. He looked like his normal self. He was kind of calm." (RRIII – 54)

Appellant's mother testified that appellant owned a truck. (RRIII – 58) Appellant's truck was a 1997 Dodge Ram extended cab pickup truck that was a gray, primer-like color with no stripes or window tint. (RRIII – 54-55, 101, 115) Appellant's mother testified that the truck had been in Beaumont before the

offense. (RRIII – 58) An Anahuac Police Department officer informed her that appellant had been seen “on the freeway licking the guardrail” (RRIII – 58)¹ She did not know how appellant returned to Houston, but when she saw him, “his appearance was aggravated, not his normal demeanor with me.” (RRIII – 59) Appellant was not able to have what his mother would call a normal conversation with her. (RRIII – 60) When asked to describe how the conversation was not normal, she testified:

I said to him that I didn’t have his truck, his brother didn’t have his truck, his truck was not in Houston. I don’t think he understood or believed that.

(RRIII – 60) After speaking with appellant, his mother was concerned for his physical wellbeing. (RRIII – 61) However, she was not successful in getting assistance. (RRIII – 61) After appellant’s mother testified, the following exchange occurred:

[Defense Counsel]: Judge, I don’t have another witness. If I can ask to approach for one brief thing?

THE COURT: Absolutely.

[Defense Counsel]: We’re going to offer his medical records.

THE COURT: Response.

[State]: Your Honor, the State objects to relevancy.

¹The State objected during this testimony but did not request an instruction to disregard it. (RRIII – 58-59)

THE COURT: Tell me the relevancy at the bench, please.

(Bench conference.)

[Defense Counsel]: These medical records support what Mr. Armstead stated earlier that he is schizophrenic and that he has mental health issues.

[State]: Judge, that all goes to punishment and not to the case in chief.

THE COURT: I'm just asking if it includes the medical records since he came into custody?

[Defense Counsel]: These—this specific set of records does not—this specific set does not include the current incarceration.

THE COURT: Okay. Do we have those records?

[Defense Counsel]: The current records?

THE COURT: Yes.

[Defense Counsel]: If I can explain. I have a portion of the current records and because he's under consistent monitoring they're not—this stamp says incomplete because they're updating daily several times a day.

THE COURT: Any response?

[State]: All of this—if we were in an insanity case or something and they had some expert to testify about these records maybe it would be relevant, but right now there is no relevancy or foundation for this to come in in the case in chief, guilt or innocence.

THE COURT: What I have difficulty with is there's no foundation laid, nobody can support the documents that's [sic] here. I mean, that may be something you're able the [sic] arrange at a later point. I'm going to sustain the objection on the basis of foundation. Thank you.

(RRIII – 62-64)

Afterwards, appellant testified that, when he was in Beaumont, he was taken by police to Spindletop Medical Center for a “psych eval.” (RRIII – 66, 75) He was later arrested there for trespassing and walked or hitchhiked back to Houston after his release from jail. (RRIII – 82-86) Appellant testified that, when he left his grandmother’s house on the date of the offense, he intended to look for his truck and he had an idea where it was located. (RRIII – 94-96) He maintained that the vehicle he took was his own truck. (RRIII – 99-101, 103, 118)

SUMMARY OF THE ARGUMENT

In holding that appellant received ineffective assistance of counsel, the majority disregarded the well-established standard of review. The majority erred by considering appellant’s medical records in its analysis because the records were not made part of the trial record. Even if the majority was permitted to include the medical records in its analysis, the majority erred in finding that appellant met his burden to show trial counsel’s performance was deficient and that appellant suffered prejudice as a result.

ARGUMENT

I. The majority's failure to apply the standard of review properly led to its erroneous holding that appellant received ineffective assistance of counsel.

Texas courts must adhere to the two-pronged *Strickland* test to determine whether counsel's representation was inadequate in violation of the Sixth Amendment right to counsel. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999); *see Strickland v. Washington*, 466 U.S. 668 (1984). Appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson*, 9 S.W.3d at 813.

An appellate court must look to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel. *Id.* While it is possible that a single egregious error can constitute ineffective assistance, this Court is hesitant to designate any error as per se ineffective assistance as a matter of law. *Id.* Judicial review of an ineffective-assistance claim must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Id.*

A. The majority should not have considered appellant's medical records in its analysis.

In an ineffective-assistance claim, the defendant must produce record evidence sufficient to overcome the presumption that, under the circumstances, the challenged action was sound trial strategy. *Villa v. State*, 417 S.W.3d 455, 463

(Tex. Crim. App. 2013) (citing *Strickland*, 466 U.S. at 689). In finding that appellant received ineffective assistance of counsel, the majority relied on a defense exhibit that contained (1) medical records which were created during appellant's incarceration for prior offenses, and (2) a business-records affidavit. (Def. Ex. 1)² See *Johnson*, 606 S.W.3d at 397-98, 401-402.

The medical records include documentation of appellant's mental health history, symptoms, diagnoses, and treatment. More specifically, they relate that:

- in June 2011, appellant was admitted to Skyview, a mental health facility within the prison system, after he appeared to be decompensating.³ (Def. Ex. 1 – Pt. 3, pg. 83, 169-76; Pt. 5, pg. 104-106, 271-72) Appellant stayed in Skyview for approximately six months before he was discharged from prison in January 2012. (Def. Ex. 1 – Pt. 1, pg. 64, 175-79, 183-91; Pt. 2, pg. 53-80, 178-99; Pt. 3, pg. 1-41, 44-81, 84-115; Pt. 5, pg. 212-23, 268-70);
- appellant did not require mandatory commitment after his discharge from prison. (Def. Ex. 1 – Pt. 2, pg. 188);

² Defense Exhibit 1 is composed of five .pdf files labeled Part 1 through Part 5. The parts consist of the following number of pages: Part 1 – 201 pages; Part 2 – 199 pages; Part 3 – 210 pages; Part 4 – 200 pages; and Part 5 – 281 pages. (Def. Ex. 1) This exhibit is not paginated. For clarity, this brief will refer to specific pages in Defense Exhibit 1 by their Part designation and their page numbers within the designated Part, as indicated by the .pdf reader.

³ Appellant had torn up his mattress and stuffed the toilet with trash, he appeared to be unaware that his behavior was abnormal, and he had done the same thing in previous cells. (Def. Ex. 1 – Pt. 1, pg. 193; Pt. 3, pg. 5, 100, 106-107, 110, 170, 174) In the month preceding his admission to Skyview, two doctors noted mental issues in their examinations of appellant, one of whom suspected that appellant's altered mental status could have been caused by a head injury. (Def. Ex. 1 – Pt. 1, pg. 67-70, 194; Pt. 3, pg. 101, 107, 110) No fracture or acute intracranial abnormality was identified. (Def. Ex. 1 – Pt. 5, 183-87)

About a week after he was admitted to Skyview, appellant tore his mattress open and soaked the bedding on the floor with urine, water, and what appeared to be feces while seeming unaware that his cell condition was not normal. (Def. Ex. 1 – Pt. 2, pg. 77; Pt. 3, pg. 91, 94) His feet were swollen from constant pacing, but he was unable to relate his pacing with his foot problems. (Def. Ex. 1 – Pt. 3, pg. 91) He thereafter received compelled medication. (Def. Ex. 1 – Pt. 3, pg. 82, 91-92)

- before his admission to Skyview, appellant had minimal contact with the prison mental health staff. (Def. Ex. 1 – Pt. 1, pg. 194; Pt. 3, pg. 101, 106-107, 110, 178-200);
- during a subsequent incarceration in 2014 and 2015, appellant received outpatient mental health services, including monitoring and chart review following disciplinary cases, but he was not admitted to Skyview. (Def. Ex. 1 – Pt. 1, pg. 17-25, 63; Pt. 2, pg. 128-29; Pt. 3, pg. 116-68, 203; Pt. 5, pg. 263-65); and
- appellant received mental health treatment after he was diagnosed with alcohol intoxication in 2002, and after he experienced drug-induced psychosis in 2003.⁴ (Def. Ex. 1 – Pt. 1, pg. 194; Pt. 2, pg. 83-87; Pt. 3, pg. 42-43, 101, 106, 110, 138, 152, 200).

The medical records also document appellant's convictions, incarcerations, history of substance abuse, number of disciplinary cases, involvement in fights, and use-of-force examinations. (Def. Ex. 1 – Pt. 1, pg. 193-94; Pt. 3, pg. 100-101, 107-108, 114, 139-40, 152, 154; Pt. 4, pg. 5-15, 87; Pt. 5, pg. 107-12)

The medical records were not admitted into evidence. (RRIII – 62-64, 170-71) The parties did not treat Defense Exhibit 1 as an admitted exhibit during trial. (RRIII – 62-64, 171) *See Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007) (parties may treat an exhibit as if those it had been formally admitted into evidence, even though it was never formally offered or admitted in the trial court). The exhibit was not made part of an offer of proof or a formal bill of exception. (RRIII – 62-64) *See* Tex. R. Evid. 103(a)(2); Tex. R. App. P. 33.2. Appellant did

⁴ Appellant reported that his treatment in 2003 was due to “paranoia about getting busted.” (Def. Ex. 1 – Pt. 1, pg. 194; Pt. 3, pg. 106)

not move for a new trial and he did not designate that Defense Exhibit 1 should be included in the appellate record. (CR – 102-103, 105) *See* Tex. R. App. P. 34.1, 34.6(a), (b).⁵

As a result, the majority erroneously relied on records that appellant failed to include in the trial record in support of his ineffective-assistance claim.⁶ *See Johnson*, 606 S.W.3d at 410 (Goodman, J., dissenting) (stating that appellate court cannot consider documents that are not in the record and an ineffective-assistance claim that depends on documents that are not in the appellate record is not firmly founded in the record); *cf. Rouse v. State*, 300 S.W.3d 754, 762 (Tex. Crim. App. 2009) (appellate court erred by relying on allegations included in post-trial motion because it was not self-proving and any supporting allegations were not offered into evidence at a hearing); *Frangias v. State*, 413 S.W.3d 212, 219 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (op. on remand) (materials filed in the clerk’s office in connection with a motion for new trial are not part of the substantive

⁵While there are procedures available to correct inaccuracies in a reporter’s record, the reporter’s record in this case does not state inaccurately that Defense Exhibit 1 was admitted into evidence. *See* Tex. R. App. P. 34.6(e). The record is clear that the exhibit was not admitted.

⁶It is not clear how the appellate court obtained the exhibit. When discussing a different exhibit, the trial judge commented, “I usually instruct the court reporter to carry a list of exhibits that are refused exhibits or not used exhibits so that if the case goes up on appeal the Court of Appeals has everything before it. It would be clear in the record that that was not evidence in the case.” (RRIII – 6-7) The trial judge also stated “at the end of the trial I will have the three of you certify that I’m sending the correct exhibits to the jury so you will be the last to see them.” (RRIII – 7) At the end of trial, the parties agreed that State’s Exhibits 1 through 5, and State’s Exhibits 7 through 9, “represent the entirety of the exhibits entered in trial.” (RRIII – 170-71) The medical records “were not admitted to the jury.” (RRIII – 171)

evidence unless accepted into evidence by the trial court at a hearing); *Webber v. State*, 21 S.W.3d 726, 731 (Tex. App.—Austin 2000, pet. ref'd) (when documents appear in the clerk's record that have not been introduced into evidence, they cannot be considered as part of the record).

There are cases in which appellate courts have considered information that was not properly part of the appellate record. However, this practice does not satisfy the standard of review, but instead relieves appellant of his burden to produce record evidence to support his ineffective-assistance claim. *See Villa*, 417 S.W.3d at 463; *Williams v. State*, 502 S.W.3d 262, 275 n.3 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (noting that expert reports were excluded as evidence but appeared in the reporter's record, and determining that the reports did not contain opinions about defendant's inability to form intent, as suggested in defendant's brief); *Davis v. State*, 413 S.W.3d 816, 828-31 (Tex. App.—Austin 2013, pet. ref'd) (including in ineffective-assistance analysis an examination of the record both with and without the motion for new trial and its attachments); *see also Wasserloos v. State*, No. 09-09-00225-CR, 2010 WL 1711753, at *2-3, n.1 (Tex. App.—Beaumont Apr. 28, 2010, pet. ref'd) (mem. op., not designated for publication) (considering in ineffective-assistance analysis exhibits which were excluded at trial but contained in the record).

Therefore, the majority erred in considering appellant's medical records in its analysis of his ineffective-assistance claim. Had this exhibit been omitted from consideration, the court of appeals would not have held that trial counsel was ineffective. *See Thompson*, 9 S.W.3d at 814 (on a silent record, defendant failed to rebut the presumption that trial counsel's decision was reasonable). However, even if the court of appeals was permitted to consider the medical records, the majority still erred in holding that appellant received ineffective assistance of counsel.

B. The majority erred in holding that trial counsel's performance was deficient.

In an ineffective-assistance claim, a defendant must first show that counsel's assistance fell below an objective standard of reasonableness. *Id.* at 812. Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id.* at 813. Failure to make the required showing of deficient performance defeats an ineffectiveness claim. *Id.*

There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Id.* Trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Absent such an opportunity, an appellate court should not find deficient

performance unless the challenged conduct was so outrageous that no competent attorney would have engaged in it. *Id.*

1. The majority speculated from a silent record that trial counsel misunderstood the predicate to introduce the medical records.

The majority noted that trial counsel did not (1) present a witness to testify that appellant's medical records satisfied the business-records hearsay exception, or (2) bring the affidavit contained in Defense Exhibit 1 to the trial court's attention. (RRIII – 62-64) *Johnson*, 606 S.W.3d at 397-98; *see* Tex. R. Evid. 803(6), 902(10). From this, the majority determined that trial counsel misunderstood the predicate to introduce the medical records. *Johnson*, 606 S.W.3d at 398-99. The majority concluded that there was no plausible, professional reason for the failure of trial counsel to properly prepare and offer the medical records into evidence in admissible form. *Id.* at 399. In leaping to this conclusion, the majority speculated from a silent record that trial counsel (1) did not know that a testifying witness could satisfy the business-records hearsay exception, and (2) was able to satisfy all of the self-authentication requirements for a business record.

The record is silent as to why trial counsel did not call a witness to testify that appellant's medical records satisfied the business-records hearsay exception. *See* Tex. R. Evid. 803(6). The majority interpreted the absence of such a witness to mean that trial counsel did not understand the predicate to introduce the medical

records. *See Johnson*, 606 S.W.3d at 397-99. However, it is plausible that trial counsel was aware of Rule 803(6), yet chose not to call a sponsoring witness in order to avoid cross-examination about the more damaging aspects of appellant's prison medical records. *See Rylander v. State*, 101 S.W.3d 107, 109-11 (Tex. Crim. App. 2003) (defendant failed to show deficient performance where record was silent as to why trial counsel failed to obtain medical expert testimony to support the defense that defendant's conduct was involuntary); *Mata v. State*, 226 S.W.3d 425, 431 (Tex. Crim. App. 2007) (presumption that counsel's performance was reasonably based in sound trial strategy, coupled with the absence of supporting evidence in the record of unreasonableness, compels a reviewing court to consider ways in which counsel's actions were within the bounds of professional norms); *see also Johnson*, 606 S.W.3d at 410 (Goodman, J., dissenting) (recognizing that trial counsel may not have wanted to use expert testimony to facilitate introduction of the medical records because it was possible that an expert would have had to make concessions about them). Thus, the record does not show that trial counsel misunderstood the predicate requirements of Rule 803(6). *See Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002) (ineffective-assistance claims are not built on retrospective speculation; they must be firmly founded in the record).

In finding that trial counsel also misunderstood that appellant's medical records could be admitted as self-authenticating under Rule 902, the majority

speculated that trial counsel was able to satisfy all of the rule's requirements. Rule 902(10) provides that a record which meets the requirements of Rule 803(6) is self-authenticating if the record is accompanied by an affidavit⁷, and the record and affidavit are served to each other party to the case at least 14 days before trial. Tex. R. Evid. 902(10). For good cause shown, the court may order that a business record be treated as presumptively authentic even if the proponent fails to comply with the service requirement. Tex. R. Evid. 902(10).

Trial counsel filed a motion for continuance on September 4, 2018, stating, among other things, that counsel was still waiting to receive approximately 1,000 pages of records in addition to other medical records which were recently received. (CR – 65-66) Trial began on September 13, 2018. (CR – 111; RRII – 1) The medical records at issue in this case span approximately 1,000 pages. (Def. Ex. 1) The affidavit to which the majority refers was notarized on August 31, 2018. (Def. Ex. 1 – pt. 1, pg. 1) *See Johnson*, 606 S.W.3d 398 n.5; Tex. R. Evid. 902(10). The majority also pointed out that the record does not indicate that trial counsel had the affidavit when he sought to have the medical records admitted into evidence. *Johnson*, 606 S.W.3d at 398.

The record does not describe, and trial counsel was given no opportunity to explain, the efforts to obtain the medical records or when they were received. *See*

⁷ The affidavit must comply with specific form requirements. *See* Tex. R. Evid. 902(10)(B).

Goodspeed, 187 S.W.3d at 392. Thus, the record is silent as to whether the medical records and affidavit were, or could have been, served on the State at least 14 days before trial. *See* Tex. R. Evid. 902(10)(A). Assuming trial counsel received the medical records less than 14 days before trial, the record is also silent as to whether trial counsel could have satisfied the good-cause exception to the service requirement. *See* Tex. R. Evid. 902(10). As a result, the majority’s conclusion that trial counsel misunderstood the self-authentication predicate is based on speculation from a silent record. *See Bone*, 77 S.W.3d at 835; *Rylander*, 101 S.W.3d at 109-11.

The majority also found no indication in the record that “trial counsel recognized that he could establish the proper predicate for the admission of appellant’s medical records by affidavit.” *Johnson*, 606 S.W.3d at 398. Yet, trial counsel does not have the burden to defend his performance. It is appellant’s burden to show that trial counsel provided deficient performance, and he can do so only when the record affirmatively demonstrates any alleged ineffectiveness. *See Thompson*, 9 S.W.3d at 812-13.

In concluding that trial counsel misunderstood the predicate to admit appellant’s medical records, the majority speculated from a silent record that trial counsel did not know he could present a witness to satisfy the business-records hearsay exception and that counsel was able, yet failed, to satisfy all self-

authentication requirements. Thus, even if the appellate court could consider the contents of the medical records in its analysis, the appellate record does not affirmatively show that trial counsel's performance was deficient. As a result, appellant failed to establish the first *Strickland* prong and the majority was wrong to hold otherwise. *See Thompson*, 9 S.W.3d at 813.

2. *The majority incorrectly assumed that the medical records were otherwise admissible.*

In finding that trial counsel had no legitimate trial strategy, the majority stated that the records “directly related to whether appellant formed the requisite intent to commit the offense of theft.” *Johnson*, 606 S.W.3d at 399. In its prejudice analysis, the majority stated that the medical records “would have provided extensive insight into appellant’s severe mental health issues and his seemingly abnormal behavior,” and that they provide context for why appellant would have believed the complainant’s truck was his truck. *Id.* at 401, 403.

In so finding, the majority incorrectly assumed that the medical records would have been admissible had trial counsel laid the proper foundation for them. The medical records are irrelevant to the issue of appellant’s intent on the date of the offense. Additionally, any probative value the medical records may have is substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury.

a. The medical records are not relevant to appellant's intent.

A person commits theft if he unlawfully appropriates property with intent to deprive the owner of the property. Tex. Penal Code § 31.03(a). Texas law presumes that a criminal defendant is sane and that he intends the natural consequences of his acts. *Ruffin v. State*, 270 S.W.3d 586, 591 (Tex. Crim. App. 2008). Insanity is the only “diminished responsibility” or “diminished capacity” defense to criminal responsibility in Texas. *Id.* at 593. Relevant evidence may be presented which the jury may consider to negate the *mens rea* element. *Id.* at 596; *Jackson v. State*, 160 S.W.3d 568, 574 (Tex. Crim. App. 2005). This evidence may sometimes include evidence of a defendant’s history of mental illness. *Ruffin*, 270 S.W.3d at 596; *Jackson*, 160 S.W.3d at 574. However, such evidence may be excluded under other evidentiary rules. *Ruffin*, 270 S.W.3d at 595; *see Jackson*, 160 S.W.3d at 574 (even if evidence is relevant to an element of the offense, the trial court still must determine whether the evidence is admissible). Such evidence may also be excluded if it does not truly negate the required *mens rea*. *Ruffin*, 270 S.W.3d at 596.

Because they predate the offense, the medical records do not shed light on appellant’s mental state at the time of the offense because they predate the offense. (Def. Ex. 1) Notably, the decompensation event for which appellant was treated at Skyview occurred more than five years before appellant took the complainant’s

truck. (Def. Ex. 1 – Pt. 3, pg. 169-76; Pt. 5, pg. 104-106) As the dissent observed, the medical records state various diagnoses—including psychotic disorder, not otherwise specified; antisocial personality disorder; and schizoaffective disorder—often without elaboration.⁸ (Def. Ex. 1 – Pt. 1, pg. 196; Pt. 2, pg. 192, 194; Pt. 3, pg. 7, 96, 144, 168) *Johnson*, 606 S.W.3d at 410. The medical records do not describe the symptoms or effects of those disorders or explain whether those disorders could negate appellant’s intent to deprive a person of her property. Additionally, the documented events for which appellant received mental health treatment did not involve an incorrect belief on his part that someone else’s property belonged to him.⁹

As a result, the medical records have no logical connection to, and do not directly rebut, the *mens rea* element in this case. *See* Tex. R. Evid. 401, 402; *compare with Ruffin*, 270 S.W.3d at 590, 596-97 (expert testimony was relevant to whether defendant intended to shoot at police officers where proffer included expert’s opinion that, on the date of the offense, defendant was suffering from psychotic symptoms such as hearing or seeing things that did not exist, he was

⁸ Case summaries also list various “Not Specified” issues, including different mental health disorders, without elaboration. (Def. Ex. 1 – pt. 1, pg. 175-76, 184; pt. 2, pg. 187-88; pt. 3, pg. 24, 36, 49-50, 58, 62, 66, 73-74, 85, 88, 90, 93, 99, 105, 112, 114, 118, 127, 131, 136-37, 147, 154, 160, 169, 173; pt. 5, pg. 264) The records also reference appellant’s self-reports of bipolar and schizophrenia without elaboration. (Def. Ex. 1 – Pt. 3, pg. 151, 168)

⁹ The medical records note instances in which appellant had or may have had hallucinations, but there is no indication that any of his hallucinations involved circumstances similar to the offense in this case. (Def. Ex. 1 – Pt. 1, pg. 175-78; Pt. 3, pg. 196-99)

delusional and paranoid, and he was not fully aware of the effects his behavior was having on other people); *see also Williams*, 502 S.W.3d at 275-76 (proffered expert testimony about defendant's mental illnesses, which did not address defendant's ability to form the intent to kill or his capacity to act with knowledge of his conduct and its consequences, was not relevant because it neither addressed nor negated the *mens rea* element of murder); *Woods v. State*, 306 S.W.3d 905, 909-10 (Tex. App.—Beaumont 2010, no pet.) (excluded evidence did not explain causal link between defendant's mental illness and her conduct at the time of the offense).

Thus, even if the record affirmatively showed that trial counsel misunderstood the predicate to admit the medical records, there was no deficient performance because the medical records are not relevant to rebut the *mens rea* element in this case. *See Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex. Crim. App. 2005) (reasonably competent counsel need not perform a useless or futile act); *see also Coleman v. State*, 188 S.W.3d 708, 725 (Tex. App.—Tyler 2005, pet. ref'd) (trial counsel cannot be ineffective for failing to offer inadmissible evidence).

b. Any probative value of the medical records is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

Mental disease evidence in the context of rebutting *mens rea* may be excluded under other evidentiary rules, such as Rule of Evidence 403. *Ruffin*, 270

S.W.3d at 595; *see Jackson*, 160 S.W.3d at 574 (evidence showing the condition of the mind of the accused at the time of the offense must still meet the admissibility requirements of Rule of Evidence 403). Rule 403 provides that the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. Tex. R. Evid. 403; *see Gigliobianco v. State*, 210 S.W.3d 637, 640-42 (Tex. Crim. App. 2006).

Even if appellant's medical records are considered relevant to rebut the *mens rea* element of theft in this case, any probative value they may have is substantially outweighed by the danger of unfair prejudice, confusing the issues, and misleading the jury. As discussed above, the medical records state various medical diagnoses, often without elaboration. *See Johnson*, 606 S.W.3d at 410 (Goodman, J., dissenting). Because the records do not explain appellant's previous diagnoses or link them to the issue of his mental state at the time of the offense, the medical records would likely suggest a decision on an improper basis. *See Gigliobianco*, 210 S.W.3d at 641 ("unfair prejudice" refers to a tendency to suggest decision on an improper basis, and may occur when evidence arouses the jury's sympathy for one side without regard to the logical probative force of the evidence); *cf. Jackson*, 160 S.W.3d at 574-75 (presenting evidence of mental illness does not then allow

the defense to argue that the defendant does not have the capacity to intentionally or knowingly perform an act).

The dissent also recognized that, without the aid of a medical expert, a jury of laymen is not in a position to interpret the medical records. *Johnson*, 606 S.W.3d at 410. Additionally, discussion of more than 1,000 pages of medical records would likely have consumed an inordinate amount of time. Thus, the medical records would likely confuse the issues and mislead the jury. *See Gigliobianco*, 210 S.W.3d at 641 (stating that evidence which consumes an inordinate amount of time to present might tend to confuse or distract the jury from the main issues, and that “scientific” evidence might mislead a jury that is not properly equipped to judge the probative force of the evidence); *see also Reed v. State*, 59 S.W.3d 278, 282-83 (Tex. App.—Fort Worth 2001, pet. ref’d) (without an expert witness to assist the jury in understanding defendant’s medical records, and to link the information contained therein to the issue of whether defendant’s confession was voluntarily made, admission of the records would have created an impermissible danger of misleading the jury and confusing the issues).

Therefore, even if appellant’s medical records are considered relevant, any probative value they may have is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. As a result, appellant failed to show that trial counsel’s performance was deficient due to a failure to

provide a foundation for inadmissible medical records. *See Chandler*, 182 S.W.3d at 356; *Coleman*, 188 S.W.3d at 725.

C. The majority did not consider the entire record or the totality of trial counsel's representation in its prejudice analysis.

If a defendant demonstrates that counsel's performance was deficient, he must then show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Thompson*, 9 S.W.3d at 812. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* If the deficient performance might have affected a guilty verdict, the question is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt. *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018). Failure to make the required showing of sufficient prejudice defeats an ineffectiveness claim. *Thompson*, 9 S.W.3d at 813. An appellate court must examine the totality of the representation and the evidence in evaluating the effectiveness of counsel. *Id.*; *Miller*, 548 S.W.3d at 499.

In its prejudice analysis, the majority described the testimony from the defense witnesses, including appellant, which was elicited by trial counsel. *Johnson*, 606 S.W.3d at 399-401. However, the majority failed to acknowledge—and the dissent correctly recognized—that the defense witnesses provided

substantial evidence about appellant's mental health. *See id.* at 407-408, 412 (Goodman, J., dissenting).

The majority stated that appellant's medical records provided context for why appellant would have believed the complainant's truck belonged to him. *Id.* at 403. The majority also stated that exclusion of the records prevented the jury from getting a full opportunity to consider appellant's defensive argument. *Id.* However, as discussed above, the medical records do not: (1) document appellant's mental state at the time of the offense; (2) describe the symptoms or effects of his previously diagnosed disorders; (3) indicate that the disorders could have caused him to believe that someone else's property was his own; or (4) describe an incident in which appellant believed incorrectly that someone else's property belonged to him. (Def. Ex. 1) Thus, the medical records would not have put the defense testimony into an applicable mental-disease context or explained its psychological significance. *Compare with Ruffin*, 270 S.W.3d at 597 (expert evidence explaining defendant's mental disease and when and how paranoid delusions may distort a person's auditory and visual perceptions was admissible as it related to whether defendant intended to shoot at police officers).

Further, the majority ignored the extensive harmful information contained in the medical records. *See Johnson*, 606 S.W.3d at 411 (Goodman, J., dissenting) (stating that the majority abandoned its role as neutral arbiter and acted as

appellant's advocate, which was underscored by its failure to acknowledge that the medical records contain information prejudicial to his defense); *cf. Ex parte Bowman*, 533 S.W.3d 337, 352 n.12 (Tex. Crim. App. 2017) (noting in DWI case that admission of medical record could have provided evidence of intoxication where defendant told officer that his right ankle had previously been injured, but the medical record indicated prior injury to his left ankle).

The records document multiple incarcerations as well as convictions for possession of a prohibited weapon, possession of morphine, and indecency with a child—namely, appellant's 15-year-old niece. (Def. Ex. 1 – Pt. 1, pg. 193-94; Pt. 3, pg. 100-101, 108, 152, 154) The records include appellant's acknowledgement that he “had multiple offenses and felonies and their [sic] not related to a mental illness.” (Def. Ex. 1 – Pt. 2, pg. 188) The records relate that (1) appellant has a history of using drugs, including marijuana, alcohol, cocaine, and ecstasy; and (2) his mental-health treatment in 2002 and 2003 involved alcohol intoxication and drug-induced psychosis. (Def. Ex. 1 – Pt. 1, pg. 194; Pt. 2, pg. 83-87; Pt. 3, pg. 42-43, 101, 106, 108, 110, 139-40)

The records also refer to multiple instances of violence involving appellant. Appellant became violent with clinical staff in 2002, and he threatened to throw urine on security officers when he was at Skyview. (Def. Ex. 1 – Pt. 2, pg. 79, 87) He was also involved in multiple fights and use-of-force incidents, and, at one

point, had 62 disciplinary cases. (Def. Ex. 1 – Pt. 1, pg. 67, 194; Pt. 3, pg. 107-108, 110, 114; Pt. 4, pg. 5-15, 87; Pt. 5, pg. 107-12, 188) Additionally, the incident which led to his treatment in 2002 involved appellant pulling a knife on a lifelong friend, threatening to kill him, and threatening the family with a knife. (Def. Ex. 1 – Pt. 2, pg. 87) *See Johnson*, 606 S.W.3d at 411 (Goodman, J., dissenting) (noting that appellant was convicted of theft rather than aggravated robbery, and recognizing that, had the jury received records documenting that he previously threatened another with a knife, it could have impacted deliberations as to whether he used the deadly weapon to take the truck by threat of violence).

Finally, the majority failed to consider the totality of the evidence admitted at trial, including the evidence that appellant:

- owned a truck that was a different make and color than the complainant's truck;
- was “pretty sure” his truck was impounded after he was arrested in Beaumont;
- did not put his bicycle into the bed of the complainant's truck before driving away from the scene;
- had a screwdriver with him and was prepared to use it to unlock the door or to start the ignition;
- was surprised to see an unknown woman sitting in the truck;
- moved the truck backward and forward while the complainant was trying to get out;
- did not stop the truck when the complainant's husband hit the windshield with a piece of iron;

- did not stop the truck when his brother tried to stop him during the police chase;
- did not stop the truck when the police followed him, with lights and sirens activated, for 45 minutes; and
- did not tell the arresting officers that the truck belonged to him.

(RRII – 175, 179, 181, 189-90, 201, 203-205, 211-12, 217-18; RRIII – 53-55, 91, 101-102, 112, 115-19, 126, 128-30)

Therefore, in light of all the circumstances of this case, as well as the totality of trial counsel’s representation, appellant cannot meet his burden to show on this record that there was a reasonable probability that the trial outcome would have been different had the medical records been admitted. *See Thompson*, 9 S.W.3d at 812-13; *Miller*, 548 S.W.3d at 499. The majority was wrong to conclude otherwise.

The majority erroneously held that trial counsel’s performance was deficient and that appellant suffered prejudice as a result. Had the majority followed the required standard of review, it would have found that appellant failed to meet his burden to show that he received ineffective assistance of counsel.

PRAYER FOR RELIEF

It is respectfully requested that the lower appellate court's majority decision be reversed.

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The undersigned attorney certifies that this computer-generated document has a word count of 6,506 words, based upon the representation provided by the word processing program that was used to create the document.

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